No. 259.

NOV 1 1902
JAMES H. McKENNEY,
Clerk

Mot. of Cross for Appellees (mo

IN THE

Supreme Court of the United States.

Filed Nov. 1, 1902.

OCTOBER TERM, 1901.

No. ~~575.~~ 259

THE REPUBLIC OF COLOMBIA, APPELLANT,

vs.

THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY, APPELLEES.

Motion to Dismiss Appeal.

Notice of Motion.

Brief in Support of Motion.

COWEN, CROSS AND BOND,
Solicitors for Appellees.

JOHN W. BEAUMONT,
EDWARD H. MURPHY,
of Counsel.

JOHN MURPHY COMPANY, PRINTERS AND PUBLISHERS, BALTIMORE.

28963

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE REPUBLIC OF COLOMBIA, *Appellant*,
vs.
THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY, *Appellees*,
} No. 575.

MOTION TO DISMISS.

Come now the appellees and respectfully move this Honorable Court to dismiss this appeal for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is a judgment or decree of the United States Circuit Court of Appeals for the Fourth Circuit, which under the Constitution and Laws of the United States is final.

COWEN, CROSS AND BOND,
Solicitors for Appellees.

JOHN W. BEAUMONT,
EDWARD H. MURPHY,
of Counsel.

E. J. D. Cross.

NOTICE OF MOTION.

To WILLIAM G. JOHNSON, ESQ.,
Fendall Building,
Washington, D. C.

Please take notice that on the fourth Monday in November, 1902, at the opening of the Court on that day, or as soon thereafter as counsel can be heard the motion of which the aforegoing is a copy will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with said motion in support thereof.

COWEN, CROSS AND BOND,
Solicitors for Appellees.

JOHN W. BEAUMONT,
EDWARD H. MURPHY,
of Counsel.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

Statement of the Case.[1]

This cause is a controversy of a civil nature between the Republic of Colombia (Appellant) a foreign state, and two corporations, citizens of the State of West Virginia (Appellees), growing out of an award based upon an agreement between the Republic of Colombia and one of said corporations, the Cauca Company.

By an agreement dated August 27, 1890, and ratified by the Congress of the Republic of Colombia on October 18, 1900, a certain James L. Cherry obtained a Concession from that government to construct and operate a steam railway within its limits; and in pursuance of a provision in this Concession he assigned the same on November 29, 1890, to the Cauca Company and the Colombian Construction and Improvement Company. The former company was organized to operate the railway and the latter to construct it; the former being the owner of all the capital stock of the latter. The construction of the road was begun in due time and continued until November 16, 1894, when the government declared the Concession forfeited. The companies protested against this act of confiscation, and demanded the formation of a tribunal of arbitration, in accordance with article 37 of the Concession. The government paying no heed to this demand, which from time to time was renewed, the companies brought the matter to the attention of the State Department of the United States. Whereupon this Department took action which resulted in the formation of an agreement between the

[1] Foot-note references to the record are references to the extracts from Transcript of Record, printed for the purpose of submitting this motion.

Republic of Colombia and the Cauca Company providing among other things that the company should surrender to the government the Concession and all the property connected therewith, and that the government should pay to the company an indemnity therefor, to be fixed by a special commission composed of three members, one to be chosen by the Republic of Colombia, one by the Cauca Company and a third by the Secretary of State of the United States and the Minister of the Republic of Colombia at Washington, acting jointly. The commissioners were duly appointed and met in New York on April 3, 1897, for the purpose of hearing the evidence offered by the parties in support of their respective claims, and to formulate their award thereon. Thirty-six sessions were necessary to complete this task. The commissioner appointed by the Republic of Colombia absented himself from the thirty-fifth session, for the purpose of defeating the award in which the remaining commissioners concurred, and declared to them his intention to take no further part in the proceedings. The remaining commissioners thereupon met on October 22, 1897, and executed in quadruplicate an award against the Republic of Colombia and in favor of the Cauca Company for $452,048.93, payable at New York City on January 26, 1898. And in addition thereto these commissioners allowed a counsel fee of $10,000 to the counsel who had appeared before the Commission on behalf of the Cauca Company.

On December 15, 1897, the Republic of Colombia filed a bill in equity in the Circuit Court of the United States for the District of West Virginia against the two appellees, seeking to have the award decreed to be null and void,[1] and setting out as reasons therefor; (1) that the award was executed by only two of the commissioners, (2) that these two commissioners had been guilty of fraud, (3) that they had exceeded the scope

[1] Rec. 1–15.

of their authority. On March 7th, 1898, an answer was filed by the defendants.[1] And by leave of the Court, the Cauca Company on June 8th, 1898, filed a cross bill, praying for a decree primarily for discovery and incidentally for specific performance and for payment of the award;[2] an answer to which cross bill was on the same day filed by the complainant.[3] On January 9th, 1901, the Court filed an opinion in which it held (1) that the award was not rendered invalid by its having been executed by only two members of the Commission; (2) that these commissioners had not been guilty of fraud; (3) that the award was invalid in respect to part thereof as being without the scope of the submission, but that this part being clearly separable from the remainder, which was itself within the scope of the submission, the latter should be confirmed.[4] And accordingly, on March 11, 1901, a decree was passed by the Court that the award be approved, ratified and confirmed as and for a valid and binding award for and up to the sum of $357,404.02 in gold coin of the United States of America, to be paid by the Republic of Colombia to the Cauca Company, in the City of New York, on the 26th day of January, A. D. 1898, with interest thereon from said date; and that certain items in said award aggregating $94,644.91 be disallowed, and that the $10,000 special allowance to the counsel of the Cauca Company be also disallowed.[5]

On March 18th, 1901, the Republic of Colombia took an appeal to the United States Circuit Court of Appeals for the Fourth Circuit.[6] Pending this appeal the Republic of Colombia applied to this Honorable Court for a Certiorari to said Circuit Court of Appeals, which application was denied on May 13, 1901.[7]

[1] Rec. 16–43. [2] Rec. 44–58. [3] Rec. 58–69.
[4] Rec. 72–88; 106 Fed. Rep. 337.
[5] Rec. 88. [6] Rec. 89–95. [7] 181 U. S. 619.

On July 29, 1901, the Cauca Company took a cross appeal to said Circuit Court of Appeals, from so much of the decree of the Circuit Court as disallowed the items aggregating $94,644.91.

On February 4th, 1902, the Circuit Court of Appeals filed an opinion in which it concurred with the conclusions of the lower court; and on February 8th, 1902, decreed that the decree of that Court be affirmed with costs.[1]

On February 10th, 1902, the Republic of Colombia took the present appeal to this Honorable Court.[2]

The appellant not having caused the record on this appeal to be printed, the appellees have caused to be printed such portions thereof as are necessary to properly present to this Honorable Court this motion to dismiss; and have paid to the clerk the costs of printing and his fee for supervising.

[1] Rec. 96.

[2] Rec. 97–103.

ARGUMENT.

I.

AN APPEAL DOES NOT LIE TO THE SUPREME COURT FROM A DECREE OF THE CIRCUIT COURT OF APPEALS, IN A CASE IN WHICH THE JURISDICTION OF THE CIRCUIT COURT IS DEPENDENT ENTIRELY UPON THE OPPOSITE PARTIES TO THE CONTROVERSY BEING ALIENS AND CITIZENS OF THE UNITED STATES.

26 U. S. Stat. at Large, Ch. 517, p. 828, § 6 (The "Evarts Act").

In *American Construction Co. vs. Jacksonville T. & K. W. R. Co.* (148 U. S. 372), this Court, after commenting on the provisions of the "Evarts Act," goes on to say:

> "The effect of these provisions is that, in any case in which the jurisdiction of the Circuit Court depends entirely on the citizenship of the parties (as in the case before us now) and in which the jurisdiction of that Court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the Circuit Court of Appeals only; and the judgments of the latter Court are final, unless either that Court certifies questions or propositions of law to this Court, or else this Court, by certiorari or otherwise orders the whole case to be sent up for its review and determination."
>
> 148 U. S. 382.

II.

IN THE PRESENT CASE THE JURISDICTION OF THE CIRCUIT COURT IS DEPENDENT ENTIRELY UPON THE OPPOSITE PARTIES TO THE CONTROVERSY BEING A FOREIGN STATE AND CITIZENS OF THE UNITED STATES.

On this point it is sufficient to observe that the pleadings disclose no other ground for jurisdiction.

III.

THE WORD "ALIENS" IN THE "EVARTS ACT" COMPREHENDS FOREIGN STATES SUING IN THE COURTS OF THE UNITED STATES.

This interpretation would seem to hold whether we regard a state (*a*) as a combination of its individual members, or (*b*) as a legal entity.

(*a*)

As a combination of its individual members: This would seem to require no argument. On this theory the state is a society and in the present case is composed entirely of aliens. The controversy here is clearly one then between "*aliens* and citizens of the United States."

(*b*)

As a legal entity: It has been held that a foreign independent government, as a legal entity, is a *person* within the meaning of the provision of the New York Code of Civil Proc. (§ 3268), providing that a defendant in an action brought by "a *person* residing without the State" may require security for costs.

Republic of Honduras vs. Soto, 112 N. Y., 310.

The term "alien" as used in the Judiciary Act of 1789 has been held to apply to a personal foreign sovereign. In *The King of Spain vs. Oliver* (2 Washington C. C., 429), in the Circuit Court of the United States, the point was raised as to whether the Court could entertain jurisdiction of a suit brought by a foreign sovereign. It was held that it could, because,

> "the Constitution of the United States gives jurisdiction to the Courts of the United States in cases where foreign states are parties; and the judicial Act gives jurisdiction to the Circuit Courts in all cases between *aliens* and citizens."
>
> 2 *Wash. C. C.* 432.

In its commonly accepted sense the noun "alien" no doubt comprehends a natural person only. But it can not be denied that in its judicial sense the word embraces a private corporation. Unless, therefore, some good reason for the contrary can be assigned it should be held, in its judicial sense, to include also a corporation politic.

The only conceivable reason for denying that the word "aliens" as used in the Evarts Act embraces a foreign state suing in the United States Court, is the sovereign character of such a body. Such a reason seems insufficient on its face, but it loses all its force when considered in the light of how the law regards foreign governments when they bring suit in the courts of another country.

A foreign government is exempt from suits. And this exemption is based on its sovereign character. However, it may bring suit in the courts of another country. But in doing so it divests itself of its sovereign character and privileges as regards all matters connected with or growing out of that particular suit. In other words it has descended from its high plane of sovereignty to the level of an ordinary private litigant, and thereafter in reference to the suit it has no greater rights, exemptions or privileges than has an ordinary litigant.

This Court has stated this principle and the authorities in support of it, in the following language:

> "That a foreign sovereign may sue in an English court of law or equity was settled in cases brought by the King of Spain (Hob. 113). That a foreign government may sue in Chancery by such agents as it authorizes to represent them, on whom a cross bill can be served with such process as will compel them to do justice to the defendant, was decided in *The Colombian Government vs. Rothschild* (1 Sim. 104). These cases were recognized in *The King of Spain vs. Machado*, by the House of Lords; who held that a king had the same right to sue as any other person, but that when he did sue,

it was as any other suitor, who sought or submitted to its jurisdiction."

State of Rhode Island vs. State of Massachusetts, 12 *Peters*, 657, 741, 742.

The character of a litigant sovereign is also shown by the limitations which the law has placed on him in respect of the subject matter of his suits in the Courts of another country.

A foreign sovereign can not bring suit for an infringement of his prerogative rights. His right of suit is confined to those cases in which it is sought to enforce his private rights.

1 Daniel, Ch. Practice, Ch. I, § 2, p. 17.

Emperor of Austria vs. Day, 3 De G. F. and J., 217, 251, 252.

On this point Lord Justice Turner speaking for the High Court of Chancery, in the case just cited, says:

> "The prerogative rights of sovereigns seem to me, as at present advised, to stand very much upon the same footing as acts of state and matters of that description, with which the municipal courts of this country do not and cannot interfere. Such acts and matters are recognized by international law no less than the prerogative rights of sovereigns; but the municipal courts of this country have disclaimed all right to interfere with respect to them. If the subject of one state infringes the prerogatives of a sovereign of another state, the remedy, as I apprehend lies in an appeal by the offended sovereign to the sovereign of the state to which the offender belongs, and if redress be unjustly refused, the refusal may, as I apprehend, even be made the ground of war. This I think, may be gathered from *Vattel*, and it seems to me important to be adhered to."

3 De G. F. and J., 251, 252.

It seems clear, therefore, that when a foreign government sues in the courts of another country it sues in the capacity of a private litigant; and in this respect is to be classified with its own citizens.

This principle is further borne out by the fact that as a litigant in the federal courts of this country a foreign state has no greater privileges under the Constitution of the United States than its subjects have. The Supreme Court has no original jurisdiction of a controversy because a foreign state may be a party thereto. The original jurisdiction of this Court is limited to cases affecting ambassadors, public ministers and consuls, and those in which a State shall be a party.

U. S. Const., Art. III, § 2, cl. 2.

The word "State" in this clause has been held by this Court to comprehend only a State of the Union.

State of Texas vs. White, 7 Wall., 700.

On this point Mr. Chief Justice Chase speaking for the Court, says:

> "It is not to be questioned that this Court has original jurisdiction of suits by States against citizens of other States or that States entitled to invoke this jurisdiction must be States of the Union. But it is equally clear that no such jurisdiction has been conferred upon this Court of suits by any other political communities than such States."
>
> 7 Wallace, 719.

And in *Hepburn vs. Ellzey* (2 Cranch, 445), Mr. Chief Justice Marshall in seeking to determine the meaning of the word "State" in the Constitution and the Judiciary Act of 1789, finds:

> "The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution."

Also:

> "These clauses show that the word State is used in the Constitution as designating a member of the Union, and

excludes from the term the signification attached to it by writers on the laws of nations."

2 Cranch, 452–453.

Upon the whole we submit that the proper interpretation of the word "aliens" in the Evarts Act is that it is a classification of "foreign states, citizens or subjects," the phraseology employed in the Constitution of the United States (Art. III, § 2, cl. 1) and in previous Acts of Congress relating to the jurisdiction of the federal courts.

18 U. S. Stat. at Large, p. 470.

24 U. S. Stat. at Large, p. 552.

25 U. S. Stat. at Large, p. 434.

IV.

IN CASE THIS APPEAL IS DISMISSED, THE COSTS OF PRINTING THE EXTRACTS FROM THE RECORD AND THE CLERK'S FEE FOR SUPERVISING SHOULD BE ADJUDGED AGAINST THE APPELLANT.

Bradstreet Company vs. Higgins, 114 U. S., 262.

CONCLUSION.

It is therefore respectfully submitted that this appeal be here dismissed for want of jurisdiction in this Court to review the decree of the Circuit Court of Appeals from which the same is taken; and that the costs incident thereto and to this motion to dismiss, including the costs of printing the extracts from the record and the clerk's fee for supervising be adjudged against the appellant.

COWEN, CROSS AND BOND,

E. J. O. Cross.

Solicitors for Appellees.

JOHN W. BEAUMONT,

EDWARD H. MURPHY,

of Counsel.

ADMISSION OF SERVICE OF MOTION, NOTICE AND BRIEF.

Service of the aforegoing motion, notice and brief is hereby acknowledged this.....day of November, 1902.

.....

Solicitor for the Republic of Colombia, Appellant.